

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

DA 02- 2063

Amendment of Section 73.202(b), )

MM Docket No. 01-104

Table of Allotments, FM Broadcast Stations )

RM-10103

(Auburn, Northport, Tuscaloosa, Camp Hill, )

RM-10323

Gardendale, Homewood, Birmingham, Dadeville, )

RM-10324

Orrville, Goodwater, Pine Level, Jemison, and )

Thomaston, Alabama )

To: The Commission

**OPPOSITION TO PETITION FOR RECONSIDERATION**

**PRESTON W. SMALL  
Timothy E. Welch, Esq.  
Hill and Welch  
1330 New Hampshire Ave., N.W. #113  
Washington, D.C. 20036  
(202) 775-0070  
(202) 775-9026 (FAX)  
welchlaw@earthlink.net**

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November 8, 2002

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## Summary

The subject *Petition for Reconsideration* attacks Mr. Small's ability to continue his participation in MM Docket 98-112 and shows support for WNNX LICO, Inc.'s position in MM Docket 98-112. Because of the illegal *ex parte* nature of those comments, and because Mr. Small has a due process right to protect his interests, the instant opposition is appropriately filed.

Without service upon Mr. Small or his counsel, the *Petition* claims that Mr. Small is being "uniquely abusive" in MM Docket 98-112, that Mr. Small's position is "meritless," and that the Commission must not "condone" Mr. Small's activities. More than two years ago Radio South, Inc., one of the subject petitioners, filed comments in MM Docket 98-112 which opposed Mr. Small's efforts to obtain relief. Accordingly, RSI's further comments against Mr. Small are not inadvertently made. Moreover, not only has the Commission warned RSI about the need to respect the *ex parte* rules, RSI is represented by a former chief of the section which conducted the FCC's FM station allocation rulemaking proceedings and he is intimately aware of the need to refrain from making illegal *ex parte* comments. RSI's counsel also serves as counsel to WNNX LICO, Inc., Mr. Small's sole competitor in MM Docket 98-112. Notwithstanding this mutual representation and knowledge of the FCC's *ex parte* rules, RSI and WNNX's counsel have seriously breached the *ex parte* rules in the instant proceeding, and because of WNNX's involvement, in MM Docket 98-112.

RSI requests that the Commission carve an exception to its *Cut and Shoot* rule in light of Mr. Small's purportedly "uniquely abusive" behavior in MM Docket 98-112. This is not a good case for the Commission to create a rule exception. First, despite WNNX's counsel's and RSI's claims, there has never been a finding that any of Mr. Small's pleadings have been abusive. Also, it appears that MM Docket 98-112 and the instant proceeding are related matters and that RSI and WNNX have an undisclosed financial relationship which is affecting their prosecution of the instant proceeding. If the order in MM Docket 98-112 becomes final before May 2003 WNNX will have to pay the prior

owner of its station an additional \$10-\$20 million. Because it would make economic sense to avoid that payment if possible, WNNX's counsel's desire, as expressed in the instant proceeding, to have Mr. Small eliminated from MM Docket 98-1 12 raises a serious question as to how and why WNNX would gladly pay an additional \$10-\$20 million to advance RSI's interest in the instant proceeding.

The *Petition* contains a blatant misrepresentation. Petitioners claim that they relied upon various staff actions to their detriment in the instant rulemaking proceeding and that fairness requires reinstatement and grant of the RSI and Cox counterproposals. The lead petition in this proceeding was filed on February 7, 2001 and RSI and Cox filed their counterproposals on June 18, 2001. However, in RSI's August 16, 2000 *Comments* opposing Mr. Small's June 16, 2000 *Petition for Reconsideration* in MM Docket 98-1 12 plainly states that RSI understood that RSI's ability to affect changes to its own station would have to wait finality in MM Docket 98-1 12. RSI's purported reliance upon and detriment from staff actions in MM Docket 01-104 is demonstrably false with reference to RSI's own words already on file with the Commission. Given that RSI is represented by a former FCC division chief, this misrepresentation is very serious and cannot be condoned.

Preston W. Small (Mr. Small), by his attorney, hereby opposes the *Petition for Reconsideration (Petition)* filed by Radio South, Inc. (RSI). 67 Fed. Reg. 65354 provides that an opposition to RSI's *Petition* is timely if filed by November 8, 2002. In support whereof, the following is respectfully submitted:

**A. Mr. Small's Right to File an Opposition**

1) 47 C.F.R. § 1.429(a) provides that "any interested person may petition for reconsideration of a final action in a proceeding conducted under this subpart." Unlike the reconsideration rule found at 47 C.F.R. § 1.106(b)(1) which governs reconsideration in non-rulemaking proceedings, § 1.429 contains no requirement that the "interested person" must have participated earlier in the rulemaking proceeding and there is no requirement that commencement of participation by a new party must be justified by any statement showing how the new party is adversely affected, nor even if the party is adversely affected, nor is the new party required to show why it was not possible to participate in the earlier stages of the proceeding. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Fifth Memorandum Opinion and Order*, 15 FCC Rcd. 22810 n. 8 (FCC 2000) (Commission considers petition for reconsideration of a rulemaking proceeding filed by an entity not previously a party). Moreover, while § 1.429(f) provides that "opposition to a petition for reconsideration shall be filed within 15 days after the date of public notice of the petition's filing and need be served only on the person who filed the petition," the rule is silent regarding who may file an opposition to a petition for reconsideration. It is reasonable to conclude that a party which becomes interested in a rulemaking proceeding because of the contents of a petition for reconsideration is able to file opposing comments against the offending petition for reconsideration. *Cf.* 47 C.F.R. § 1.939(e) (a person not previously interested in an application proceeding may become interested via subsequent filings made by the applicant).

2) Which brings **us** to the offending *Petition* filed in the captioned rulemaking proceeding. Paragraph 5 of the August 30, 2002 *Report and Order*, 2002 FCC LEXIS 4267 (DA 02-2063) dismissed RSI's counterproposal in the captioned proceeding because RSI's counterproposal is "contingent on the outcome of the Anniston and College Park proceeding, MM Docket No. 98-112" and because "a further petition for reconsideration and second motion to open the record was filed on August 19, 2002" in MM Docket 98-112. MM Docket 98-112 is a prior filed and cut-off rulemaking proceeding in which Mr. Small is attempting to upgrade his Station WLRR-FM which is currently licensed to Milledgeville, GA. RSI is represented by the same counsel which represents WNNX LICO, Inc. in the pending MM Docket 98-112 and **WNNX** is Mr. Small's only competitor in MM Docket 98-112. RSI's and WNNX's mutual counsel is improperly using the instant proceeding to attack Mr. Small on matters relating to Mr. Small's participation in MM Docket 98-112 and Mr. Small has a due process right to respond to those allegations in the proceeding in which those allegations are raised.

#### **B. RSI and WNNX Have Violated the *Ex Parte* Presentation Prohibition**

3) The first problem with WNNX's counsel's and RSI's use of the instant rulemaking proceeding for the purpose of trying to score points against Mr. Small in MM Docket No. 98-112 is that secretly attacking Mr. Small is illegal. A prohibited *ex parte* presentation is a communication made to decision making Commission personnel which is directed to the "merits or outcome of a proceeding," but which is not served upon parties to the proceeding. 47 C.F.R. § 1.1202(a),(b),(c). 47 C.F.R. § 1.1208 provides that "proceedings involving amendments to the broadcast table of

allotments,” like the instant one, and like MM Docket 98-112, are “restricted” and *ex parte* communications are prohibited.’

4) WNNX’s counsel and RSI filed their *Petition*, without service upon the undersigned or Mr. Small, on October 9, 2002 and our names do not appear on the *Petition*’s service list. At pages 9-10 of the *Petition* WNNX’s counsel and RSI argue that “the filing of four petitions for reconsideration by Preston Small in the Anniston/College Park Proceeding constitutes a very unique abuse of the FCC processes.” WNNX’s counsel and RSI further argue that “to allow the filing of a fourth petition for reconsideration to thwart the provision of first local service to four new communities disserves [sic] the public and essentially elevates and condones this sort of behavior.” In footnote 21 of the *Petition* WNNX’s counsel and RSI argue that Mr. Small’s *Petition for Reconsideration* in MM Docket 98-112 is “meritless” and that the Commission had changed its rules for the purpose of preventing the filing of pleadings such as Mr. Small’s “meritless” petition.

5) These *ex parte* comments are clearly directed to the merits of Mr. Small’s *Petition*. It is settled Commission law that an expression of support for one side to a proceeding which is made without the knowledge of the other side is an illegal *ex parte* presentation. *Rainbow Broadcasting Company*, 13 FCC Rcd. 21000 ¶ 14 (FCC 1998). WNNX’s counsel’s and RSI statements not only show support for WNNX’s position in MM Docket No. 98-112, the comments are attacks against Mr. Small’s very right to continue to participate in MM Docket 98-112. It cannot be disputed that

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<sup>1</sup> RSI’s *Petition* is a joint Petition with Cox Radio, Inc. and CXR Holdings, Inc. The circumstances under which ostensibly competing companies have come together to file a joint *Petition*, and to jointly violate the Commission’s *ex parte* rule and to injure Mr. Small, are unknown. Because it is counsel to WNNX and RSI which is common to both rulemaking proceedings, the focus of this opposition is on Mr. Lipp, WNNX, and RSI. However, Cox Radio, Inc. and its counsel are also responsible for their role in participating in the *ex parte* violation. A complaint concerning this matter is being concurrently filed with the Commission’s General Counsel pursuant to 47 C.F.R. § 1.1214.

WNNX's and RSI's shared counsel, Mr. Lipp, as the former chief of the Commission's section responsible for handling amendment of FM table of allotments, is well aware of the prohibition on *ex parte* communications in allocation rulemaking proceedings and that he has been aware for many years of the penalty for violating that rule. See *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Vero Beach, Florida), Notice of Proposed Rule Making*, 3 FCC Rcd. 1632 ¶ 13 (Lipp, Chief, Policy and Rules Division 1988) (Mr. Lipp instructs the public that "any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding.").

6) It also cannot be disputed that RSI knows of the *ex parte* prohibition in the context of FM channel allocation proceedings. In *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, Macaon. Mississippi, Notice of Proposed Rule Making*, DA 01-348, ¶ 8, released February 9, 2001, RSI was instructed by the Commission that

For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. . . . any new written information elicited from such a request or a *summary* of any new oral information shall be served by the person making the presentation upon any other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an ex aarte presentation and shall not be considered in the proceeding.



Paragraph 6 of the *Notice of Proposed Rule Making*, DA 01-1093, released June 18, 2001, commencing the instant rulemaking proceeding, contains the same *ex parte* warning. RSI has previously opposed Mr. Small's efforts to upgrade his Milledgeville station. See RSI's August 16, 2000 *Comments on Petition for Reconsideration*, filed in MM Docket 98-112. RSI has long opposed Mr. Small's effort for relief in MM Docket 98-112 and RSI's opposition to Mr. Small as expressed in the *Petition* cannot be construed as "incidental" nor "inadvertent."

7) It seems that in WNNX's counsel's and RSI's zeal to deny Mr. Small reconsideration filing rights which many parties utilize, including RSI in the instant proceeding, they ignored the fact that they are not permitted to argue against Mr. Small's position in documents which are not served upon Mr. Small or his counsel. In an effort to paint Mr. Small in a bad light, WNNX's counsel and RSI engage in behavior which is specifically prohibited by clear rule. Mr. Small has explained his position at every stage of MM Docket 98-112 and while counsel to WNNX and RSI apparently do not like the fact that Mr. Small is doing his best to protect his rights, neither counsel to WNNX nor RSI has any right to argue the merits of MM Docket 98-112 or show their support for WNNX in the instant proceeding without serving Mr. Small with a copy of the pleading.

8) As discussed above, the appropriate penalty in a rulemaking proceeding for an *ex parte* violation is refusal to consider the offending document, that is, the Commission should dismiss the *Petition*. This would be an appropriate penalty to impose upon RSI for its flagrant abuse of the *ex parte* rules. Similarly, because WNNX's counsel participated in the *ex parte* violation, an appropriate remedy is to prohibit WNNX from participating any further in MM Docket 98-112.<sup>2</sup>

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<sup>2</sup> Under long standing Commission rule WNNX's counsel improper activities are properly imputed to the principal, WNNX. *Carol Sue Bowman*, 6 FCC Rcd. 4723 ¶ 4 (FCC 1991); *Hillebrand Broadcasting Corp.*, 1 FCC Rcd. 419, 420 n. 6 (FCC 1986). There is no reason to believe that WNNX is unaware of its counsel's improper activities and, as explained in Section C (continued...)

9) The substantive charge leveled by WNNX's counsel and RSI that Mr. Small has abused the Commission's processes in MM Docket 98-112 is meritless. WNNX's counsel and RSI state that "the filing of four petitions for reconsideration by Preston Small in the Anniston/College Park Proceeding constitutes a very unique abuse of the FCC processes." While the fourth of Mr. Small's petitions for reconsideration remains pending, it is observed that the Commission did not find Mr. Small's three earlier petitions to be abuses of the Commission's litigation processes, much less determined that Mr. Small is abusing the processes in a "very unique" manner.<sup>3</sup>

10) WNNX's counsel's and RSI's claim that Mr. Small has abused the Commission's process by filing "four" petitions for reconsideration fails to recognize that none of Mr. Small's filings has been found by the Commission to be abusive. WNNX's counsel and RSI fail to explain how the filing of non-abusive pleadings could possibly constitute "a very unique abuse of the FCC processes;" we must agree that it certainly would be "unique" to find that Mr. Small had abused the Commission's processes by filing non-abusive pleadings.

11) WNNX's counsel and RSI are concerned that Mr. Small has filed multiple reconsideration petitions. Each of Mr. Small's pleadings has contested the contents of the most

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'(...continued)

below, the facts reveal that WNNX and RSI are working in concert to obtain mutually beneficial relief through various rulemaking proceedings. Even if WNNX were unaware of its counsel's efforts to advance its cause through *ex parte* communications, Mr. Lipp is a former Commission division chief who is intimately familiar with the Commission's *ex parte* prohibition and it is WNNX's responsibility to choose its counsel with care.

<sup>3</sup> In the Commission's most recent order in MM Docket No. 98-112, *Memorandum Opinion and Order*, 2002 FCC LEXIS 3623 (FCC 02-201) (released July 25, 2002), the Commission did determine that one of Mr. Small's arguments, out of many, was "frivolous" because Mr. Small sought to "reargue" the merits of a "ten year old staff decision." Mr. Small's most recent petition for reconsideration in MM Docket 98-112 contests that finding, and other aspects of the order, on the grounds that Mr. Small was not rearguing anything and because neither the age of the precedent, nor the fact that the precedent is a "staff" decision, a decision which has the same force and effect as a Commissioners' order under the Communications Act, support a finding of frivolity.

recently released Commission order in MM Docket 98-112. Mr. Small is not sticking around to argue the merits of prior orders, although discussion of prior orders might necessarily arise from time to time for the purpose of providing context. WNNX's counsel and RSI should be advised, if they are not already aware, that it is a longstanding, stringent, and unforgiving, requirement that any issue to be raised in the court of appeals must first be argued before the FCC. *See e.g., Beehive Telephone Company*, 179 F.3d 941, 946 (D.C. Cir. 1999). While the appellate litigation rules are stringent in that a claim may be dismissed by an appeals court if administrative remedies have not been exhausted, the manner in which one properly satisfies the exhaustion requirement is not always crystal clear. In *Time Warner Entertainment Co., L.P. v. FCC*, 144 F.3d 75, 81 n. 7 (D.C. Cir. 1998) the Court determined that "given the apparent tension in our cases [regarding exhaustion], a prudent counsel when in doubt should seek reconsideration before the Commission."<sup>4</sup> Additionally, a party attempting to exhaust its remedies before an administrative agency is not required to guess, beforehand, whether the agency might find the reconsideration pleading repetitious. *See e.g. Southwestern Bell Telephone Company v. FCC*, 116 F.3d 593, 597-98 (D.C. Cir. 1997).

12) Consequently, whenever the FCC issues an order on reconsideration which states anything more than "our prior decision is affirmed," the adversely affected party must consider whether further agency review of the matter is required before proceeding to judicial review. Whether a party files one reconsideration pleading, or ten, the raw number of pleadings filed is irrelevant in examining whether there is an abuse of process. For instance, as discussed above, RSI

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<sup>4</sup> In *Time Warner Entertainment Co., L.P. v. FCC* Judge Randolph, concurring in part and dissenting in part, writes that all perceived procedural and substantive errors must be brought to the Commission's attention before litigation is filed in the court of appeals. 144 F.3d at 82-5. *See also Omnipoint Corporation v. FCC*, 2 CR 816 78 F.3d 620, 635 (D.C. Cir. 1996) ("this Court has construed § 405 to require that complainants give the FCC a 'fair opportunity to pass on a legal or factual argument' before coming to court.").

has filed a petition for reconsideration in the subject docket. In that single filing RSI and WNNX have abused the Commission's processes by including illegal *ex parte* communications and, as discussed below, by lying to the Commission. Just as it is possible to abuse the Commission's processes by filing one petition for reconsideration, it is possible to avoid abusing the Commission's processes by filing multiple petitions for reconsideration provided that each are filed in good faith and are directed toward matters discussed in the Commission's most recently released order. WNNX's counsel and RSI obviously prefer a process where they get to make illegal *ex parte* comments and misrepresent matters to the Commission, while Mr. Small has no pleading rights, but that's not the way the process operates.

**C. This Is Not A Good Case to Carve the *Petition's* Requested *Cut and Shoot* Exception**  
**1. There Are No Abuse Findings and Multiple Reconsideration Petitions Are Common**

13) RSI requests that the Commission "should carve out a very narrow exception to *Cut and Shoot* in recognition of the unusual, special facts of this case where, but for an abuse of process in another rulemaking proceeding, Cox's and Radio South's Counterproposals faced no obstacles to grant." *Petition*, at 10. This request for an exception is out of line for several reasons. The Commission has never found that Mr. Small has engaged in abusive filings before the Commission even if the *Petition* reads as if such a finding has been made. While WNNX's counsel and RSI might wish to utilize a secret soap box from which to voice their thoughts on Mr. Small's position in MM Docket 98-112, such vocalization does not make their position correct. WNNX's counsel and RSI are not authorized to make legal determinations about MM Docket 98-112, even if they appear to claim the authority to determine what activities are abusive, and their comments about Mr. Small's filing activities is nothing more than their illegally expressed opinion.

14) Petitions for further reconsideration are a routine matter at the Commission and such filings are not "unique" as RSI opines. The Commission has, on countless occasions, considered

petitions for reconsideration of orders which denied prior filed reconsideration petitions. *See e.g. Southern Communications Systems, Inc.*, 2001 FCC LEXIS 5538 n. 1 (FCC 2001) (FCC 01-298); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Fifth Memorandum Opinion and Order*, 15 FCC Rcd. 22810 ¶¶ 3, 6, 8 (FCC 2000); *Interconnection and Resale Obligations Pertaining To Commercial Mobile Radio Services, Order on Reconsideration of Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd. 16221 ¶ 4 (FCC 2000). RSI is demonstrably wrong when it complains that the mere filing of multiple reconsideration petitions is improper.

## **2. WNNX's Undisclosed Financial Interest in Docket 01-104**

15) The curious circumstances of the instant rulemaking proceeding do not make it an appropriate vehicle to carve out rule exceptions for RSI. For reasons unknown, WNNX's counsel is obviously frustrated with the progress of MM Docket No. 98-112 even though WNNX is currently operating at its relocated Atlanta site, pending finality in MM Docket 98-112, and even though, as Mr. Small has only recently learned, if finality does not occur in MM Docket 98-112 prior to May 2003, WNNX will avoid a \$10-\$20 million payment to the prior owner of WNNX's station. *See BALH-961118GM, Asset Purchase Agreement*, § 2.4, page 5.

16) Perhaps WNNX's counsel is eager for WNNX to pay an additional \$10-\$20 million, and perhaps WNNX does not mind paying \$10-\$20 million out of its pocket so that WNNX's counsel's RSI client can proceed with its own rulemaking proposal. However, the unanswered questions which clearly arise are – why would WNNX want to pay an additional \$10-\$20 million so that RSI can proceed with its counterproposal in the captioned proceeding? Is there some undisclosed relationship between these companies? Are the companies engaged in some activity which is prohibited by the Commission's rules, but which can go undetected if purportedly independent

companies are involved? Right now there are no answers, only \$20 million worth of questions. As Bob Woodward and Carl Bernstein proved in the early 1970's, it is productive to "follow the money" and WNNX's desire to pay an additional \$10-\$20 million just so RSI can proceed in the instant proceeding produces a lot of smoke and there is likely a large fire creating it.

17) Adding to the already smokey condition is the fact the ***Petition*** is joint undertaking by erstwhile competitors in the captioned rulemaking proceeding. There must be some agreement between RSI and Cox which prompted their joint undertaking, but at this point one can only wonder what that agreement is because the terms have not been disclosed to the Commission. Curiously, while both RSI and Cox would have benefitted from Cox's buyout of the original petitioner Auburn Network, Inc., but for the dismissal of both RSI's and Cox's counterproposals because of the pendency of MM Docket 98-112, RSI did not file a certification in compliance with § 1.420(j) regarding that buyout.

18) It is now beyond dispute that RSI and Cox have a preexisting contractual relationship between them concerning the prosecution of the instant rulemaking proceeding, the terms of which have not yet been revealed to the Commission. Moreover, the lead petitioner in the instant proceeding which proposed a new FM drop-in at Auburn was "bought out" merely for its expenses. ***Report and Order***, DA 02-2063, n. 2. These facts raise a serious question as to whether RSI and Cox orchestrated the filing of Auburn's Network, Inc.'s original petition for rulemaking for the purpose being able to file protected counterproposals on the pertinent cut-off date, proposals which do not conflict with each other, with the intent of "buying out" Auburn Network, Inc. thereby eliminating competition from the purported "new" facility and ensuring themselves grants.'

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<sup>5</sup> RSI and Cox's plan was trashed by the fact that neither proposal protected the existing allocation for Channel 263C at Anniston, **AL**.

19) RSI and Cox state that they “had little choice but to file their counterproposals in accord with the public notice issued by the Commission.” *Petition*, at 16. This attempt to make it appear that the *two* purportedly independent companies were forced to file is inane. It is too much coincidence to believe that both RSI and Cox ignored filing their own upgrade proposal possibilities for who knows how long until, out of the blue, Auburn Network, Inc. files a rulemaking petition and that it was Auburn’s filing which somehow “forced” RSI and Cox to ride coattails by filing protected counterproposals on Auburn’s cut-off date. A more likely scenario is that WNNX, RSI, and Cox will benefit by WNNX’s payment of an additional \$10-\$20 million dollars by May 2003, and that WNNX, RSI, and Cox have a hidden agreement concerning station allocations, of which the \$10-\$20 million payment is part of the mix.

#### **D. RSI’s Blatant Misrepresentations to the Commission**

20) The *Petition* contains blatant, disqualifying misrepresentations. At page 8 of the *Petition* RSI, Cox, and WNNX state that

The Division’s acceptance of ANI’s Updated Petition, Cox’s Counterproposal, and Radio South’s Counterproposal coupled with its subsequent sudden change in course has substantially harmed Cox and Radio South. On April 27, 2001 the Division accepted ANI’s Updated Petition and on October 23, 2001 accepted Cox’s and Radio South’s Counterproposals as technically correct. Cox and the affected parties relied on the Division’s actions and expended substantial amounts of time and money on preparation and submission of further pleadings in the proceedings. Regulated parties should be allowed to rely on a government agency’s actions and are entitled to assume that the staff decisions are consistent and evenly applied.<sup>6</sup>

Even if RSI were correct that the staff could never change its mind after taking a certain action, a proposition which is resoundingly incorrect else reconsideration would be an empty vessel, RSI had actual notice that the lack of finality in MM Docket 98-1 12 was going to delay its own rulemaking

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<sup>6</sup> It is not known why RSI considers that it can argue that the Commission is not being fair but that Mr. Small cannot make similar arguments. What is known is that RSI positions are laughably inconsistent.

activities. In RSI's August 16, 2000 *Comments on Petition for Reconsideration* which RSI filed against Mr. Small in MM Docket 98-112, RSI plainly states that

There is pending before the Commission an application filed by RSI on October 12, 1999, and amended on May 3, 2000, which proposes to specify operation of WLXY on Channel 263C1 at Northport, Alabama (File No. BPH-19991012AAG), pursuant to the Commission's one-step upgrade process. . . . However, **as a result of the filing of the [Mr. Small's] Petition for Reconsideration, the Report and Order [DA 00-322 released in MM Docket 98-112] has not become final and the staff of the Mass Media Bureau will not process RSI's application until the reconsideration petition is acted upon.**

RSI's August 16, 2000 *Comments on Petition for Reconsideration*, at 1-2 (emphasis added).

21) The lead petition in the captioned rulemaking proceeding was filed on February 7, 2001. RSI and Cox filed their counterproposals on June 18, 2001. The subject rulemaking proceeding did not commence until months after RSI had already explained, in its August 16, 2000 *Comments* opposing Mr. Small in MM Docket 98-112, that it understood that its station improvement plans would be delayed pending finality in MM Docket 98-112. RSI has attempted to mislead the Commission regarding its purported reliance upon, and detriment resulting from, staff actions taken in the instant proceeding. RSI knew long before it filed its June 18, 2001 counterproposal in the captioned proceeding that its efforts to improve its own situation would be delayed by the rulemaking in MM Docket 98-112. The *Petition's* claim of surprise is demonstrably false with reference to RSI's own words contained in a document RSI itself filed with the Commission.

22) The Commission does not tolerate misrepresentation or lack of candor and RSI's bald-faced lies cannot be countenanced. While RSI's behavior would be shocking in its own right, given the fact that RSI is represented by a former Commission division chief who is intimately acquainted with the Commission's demands for truthful dealing, RSI's misrepresentation is most egregious and must be considered to be disqualifying. Moreover, because the misrepresentation was made in an effort to improve RSI's Station WLXY(FM), Northport, AL, and RSI's Station WTUG(FM)

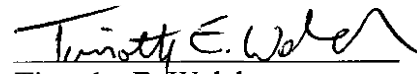


Tuscaloosa, AL, the Commission must commence a hearing to determine whether RSI has the requisite character qualifications to continue as the licensee of those stations. See *Family Broadcasting, Inc.*, 16FCC Rcd. 4330 ¶¶ 15-16(FCC 2001) (misrepresentation is disqualifying and the Commission designated a licensee for a character hearing concerning statements the licensee made regarding a transmitter relocation proposal).

WHEREFORE, in view of the information presented herein concerning RSI's violation of the *ex parte* rule, and in view of RSI's, WNNX's, and Cox's undisclosed agreements to work together to achieve rulemaking results, and in view of RSI's palpably false statements concerning its "surprise" at the staff's ruling dismissing its counterproposal, it is respectfully requested that the subject *Petition* be denied and that forfeitures be considered in light of the egregious nature of RSI's *ex parte* violations and its clear failure to deal truthfully with the Commission

Hill & Welch  
1330 New Hampshire Ave., N.W. #113  
Washington, D.C. 20036  
(202) 775-0070  
(202) 775-9026 (FAX)  
welchlaw@earthlink.net  
November 8, 2002

Respectfully submitted,  
PRESTON W. SMALL

  
Timothy E. Welch  
His Attorney

## CERTIFICATE OF SERVICE

I hereby certify that I have this 8<sup>th</sup> day of November 2002 served a copy **of** the foregoing OPPOSITION TO PETITION FOR RECONSIDERATION by First-class United States mail, postage prepaid, upon the following:

Mark N. Lipp  
Erwin G. Krasnow  
Shook, Hardy and Bacon  
600 14<sup>th</sup> Street, N.W. Suite 800  
Washington, D.C. 20005-2004

Kevin F. Reed  
Elizabeth A. M. McFadden  
Nam E. Kim  
Dow, Lohnes & Albertson, PLLC  
1200 New Hampshire Ave., N.W. #800  
Washington, D.C. 20036

Auburn Network, Inc.  
c/o Lee G. Petro  
Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900 East Tower  
Washington, D.C. 20005

Marengo Broadcast Association  
5256 Valleybrook Trace  
Birmingham, AL 35244

Dale Broadcasting, Inc.  
P.O. Box 909  
Alexander City, AL 35051

Mark Blacknell  
Womble Carlyle Sandridge & Rice  
1401 Eye Street, N.W. # 700  
Washington D.C. 20005

Williamson Broadcasting, Inc.  
702 East Battle Street, Suite A  
Talladega, AL 35161

Scott Communications, Inc.  
273 Persimmon Tree Road  
Selma, AL 36701


southeastern Broadcasting Co.  
P.O. Box 1820  
Clanton, AL 35045

Dan J. Alpert  
2120 N. 21<sup>st</sup> Road  
Arlington, VA 22201

Kathy Archer, Vice President  
CapStar Broadcasting Partners  
600 Congress Avenue #1400  
Austin, TX 78701

Joan Reynolds  
Brantley Broadcast Associates  
415 North College Street  
Greenville, AL 36037

James R. Bayes  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

  
Timothy E. Welch